

IN THE COURT OF COMMON PLEAS FOR THE STATE OF DELAWARE

IN AND FOR SUSSEX COUNTY

Timothy J. Munro,	:	Civil No.U608-03-081
Plaintiff	:	
vs.	:	
Beazer Home Corporation	:	Date Submitted: May 5, 2011
Kenwood Development LLC	:	Date Decided: June 23, 2011
Kenneth S. Woodring	:	
Defendant(s)	:	

Dean A. Campbell, Esquire counsel for Plaintiff
Charles J. Brown, Esquire counsel for Beazer Homes
David N. Rutt, Esquire counsel for Kenneth Woodring

DECISION AFTER TRIAL

Plaintiff Timothy Munro brings this action for damages alleging that defendants promised to connect his property to the Fenwick Island Sewer District and failed to do so. In addition to breach of contract against all parties, Munro brings an action in fraud against Defendant Kenneth Woodring and an action in *quantum meruit* against Defendant Beazer Homes Corporation. Both defendants deny liability or, in the alternative, assert the other is liable. Finally, the parties stipulate that Woodring's sole proprietorship, Kenwood Development Co., is a nominal party only and that Woodring assumed personal liability for all Kenwood contracts material to the litigation.

There are essentially two issues: (1) Was Woodring or Beazer contractually obligated to connect Munro's home to the Fenwick Island Sewer District; and (2) if so, did Munro suffer any damages?

At the conclusion of the trial on this matter, the Court reserved decision and requested that the parties submit their closing arguments in writing. After carefully reviewing the parties' submissions, the Court finds in favor of Munro and Beazer and against Woodring for the reasons stated herein.

FACTUAL BACKGROUND

Woodring is a Maryland-based real estate developer who, during the late 1990s, operated in Sussex County, Delaware. Woodring, with the help of two third-party investors, purchased a parcel of land now known as Ashley Manor for approximately \$300,000.

The Ashley Manor parcel is located northwest of Fenwick Island, a popular beach community. Woodring and his investors purchased the parcel with the intention of developing it into a large residential community, complete with a community pool and club house.¹ As for the prospective residents, Woodring envisaged their "average age ... [to be] between 65 and 75. Not the type of people to be running thru [sic] the woods ..."; that is to say, Woodring intended to create a relaxing retirement community by the beach.²

Before Woodring could begin construction of the Ashley Manor development, however, he needed to rezone the parcel. At the time of its purchase, Ashley Manor sat in an agricultural residential district. This would not suit the large retirement community planned by Woodring.³ Thus, Woodring and his landscape architects submitted an application to the Sussex County Council to rezone the Ashley Manor parcel into a high density residential district.⁴

Woodring's application was a partial success. The Sussex County Council agreed to rezone the Ashley Manor parcel into a high density residential district on the condition that Woodring connect it and adjacent properties to the Fenwick Island Sanitary Sewer District.⁵ Satisfaction of this condition required the approval of adjacent landowners whose properties were served by privately owned septic systems.⁶

Woodring's architects first proposed to accomplish the necessary connection through a series of subterranean easements. Pursuant to this proposal, Woodring planned to run eight-inch diameter pipes from the Ashley Manor parcel in a southeasterly direction across adjacent properties and, ultimately, connect the pipes to a pump station within the Sewer District. One of these planned easements would run through the property of Timothy Munro.⁷

¹ Woodring ex. 4.

² Munro ex. A.

³ Munro ex. B.

⁴ Munro ex. B.

⁵ Munro ex. B.

⁶ Woodring ex. 3.

⁷ Woodring ex. 3.

Munro did not share Woodring's desire to bring sewer services to the area. It was Munro's view that his new septic system capably served his needs and he did not want to pay any additional expenses associated with a sewer connection. Moreover, Munro feared that the future residents of Ashley Manor would trespass across his land by way of the proposed easement toward a convenience store located across the street. Accordingly, Munro objected to Woodring's initial plan.⁸

In response, Woodring submitted a new proposal that avoided the need for an easement across Munro's property.⁹ The new proposal, however, did not avoid the annexation of Munro's property into the Sewer District. Thus, Woodring still required Munro's acquiescence to the plan.¹⁰

The rezoning was vital to Woodring's success with the Ashley Manor project. Woodring, therefore, approached Munro to gain his approval. After some negotiation, Munro agreed to remove this objection of Woodring's second proposal as consideration for the first of two agreements ("first contract"):

In consideration for your cooperation in the expansion of the sewer district, we hereby agree to be responsible for any monetary impact this may have on your property. This would include Front Foot Benefit Charges, increase in property taxes and *if required*, connection fees and cost of sewer service.

Sussex County allows for exemptions for sewer connections under certain circumstances. Kenwood Development Co. [*i.e.*, Woodring's sole proprietorship] accepts the responsibility for filing any documents if an exemption is required.

This agreement will be for a period of 10 years from date of sewer services availability.¹¹

Pursuant to this agreement, Munro sent a letter to Sussex County Council and removed his objection to Woodring's second proposal.¹² Woodring, however, never sought an exemption on behalf of Munro.

Despite his contractual obligation to withhold his opposition to the Sewer District expansion, Munro renewed his objection less than one year later at a public hearing.¹³ Evidently, Munro still had concerns, perhaps *new* concerns, regarding the expansion of the Sewer District. The Council, therefore, reserved its decision on Woodring's second proposal and provided Woodring and Munro an opportunity to discuss possible solutions. The parties' negotiations produced a second agreement ("second contract"):

⁸ Munro ex. A.

⁹ Woodring ex 4.

¹⁰ Woodring ex. 5.

¹¹ Munro ex. C.

¹² Munro ex. D.

¹³ Munro ex. E.

As we discussed ... the expansion of the sewer district will eliminate the possibility in the future for you to construct a replacement LPP septic system to serve your personal residence. This letter is offered to confirm an agreement we discussed as follows:

At such time that Ashley Manor residential planned community is constructed, and the gravity sewer piping is installed ... to serve Ashley Manor, a small diameter force main will be installed from [the gravity sewer] to your residence. The force main as currently envisioned will be approximately one (1) inch in diameter ... The cost of installation of the force main will be borne entirely by the Ashley Manor developer.¹⁴

In a subsequent letter, Woodring assured Munro that the foregoing agreement incorporated the original contract.¹⁵

Munro, thereafter, removed his second objection to Woodring's proposal. As a result, the Sussex County Board adopted a resolution to expand the Sewer District to include Ashley Manor and, incidentally, the Munro property.¹⁶

Despite his success in securing all the necessary approvals for the Ashley Manor development, Woodring could not maintain ownership of the project long enough to see construction begin. A business dispute between Woodring and his investors required the intervention of the Court of Chancery which resolved the conflict by ordering a partition of the property. As a result, Woodring and his fellow investors entered into negotiations with Beazer, a home builder and dealer.

Beazer ultimately agreed to purchase Ashley Manor from Woodring and his investors for \$4,275,000. The Agreement of Sale contained a Due Diligence Clause whereby Beazer reserved the right to walk away freely if dissatisfied with the information provided by Woodring. The parties twice executed amendments to the agreement which, together, extended the due diligence period to over 100 days.¹⁷

During this time, Woodring provided Beazer access to a series of private business documents. These documents included a federal wetlands delineation and boundary survey, a series of preliminary site plans, letters associated with an environmental impact study, letters concerning zoning approval, agreements with a local water company, and a copy of minutes from the Sussex County Council hearing wherein the Council approved the expansion of the Sewer District.¹⁸ To the Court's knowledge, the copy of these

¹⁴ Munro ex. F (emphasis in original).

¹⁵ Munro ex. F.

¹⁶ Munro ex. E.

¹⁷ Woodring ex. 9.

¹⁸ Woodring ex. 15.

minutes is the only document that gives mention of Munro. The minutes do not document any obligation to connect Munro to the Sewer District.

In addition, Beazer had access to any publicly accessible information concerning the Ashley Manor development held by State agencies. A memorandum drafted by Woodring's architects and provided to Beazer during the due diligence period recommended that "[a]dditional research should be undertaken at the Sussex County Planning and Zoning Department, Sussex County Engineering Department, Delaware Department of Transportation, Sussex Conservation District, Natural Resources Conservation Services, DNREC, and the Office of The State Fire Marshall."¹⁹

The Court heard testimony that information held by these agencies contained references to the Munro-Woodring contracts. Despite the architects' recommendations, Beazer did not inspect these public resources.

After the due diligence period expired, but before settlement, Beazer assigned the Agreement of Sale to Beazer's general contractor, Ashley Manor, LLC, which ultimately settled on the property. Prior to closing, Woodring and his investors assigned "all their rights, title, and interest in all Plans and other Development Data prepared by and/or acquired by and utilized by Seller's engineer ... to secure the approval of the Preliminary Site Plan ..."²⁰

Ashley Manor, LLC began construction of the retirement community sometime after settlement and, in the process, connected it to the Sewer District. At this time, however, the subcontractor responsible for Ashley Manor's sewer connection refused to connect Munro.

Munro contacted his counsel in this case soon after it became apparent that Ashley Manor's subcontractor did not intend to connect Munro's property to the Sewer District. Munro's counsel, thereafter, dispatched a letter to both Beazer and Woodring demanding assurance that the parties intend to honor the Munro-Woodring contracts by performing a sewer connection and by paying any economic impact incurred to Munro associated with the Sewer District expansion.²¹

In response, then-counsel for Beazer denied any knowledge of the Munro-Woodring contracts and indicated that it had no intention of performing any obligation undertaken by Woodring.²² Woodring, likewise, denied any liability for the Munro-

¹⁹ Woodring ex. 15.

²⁰ Woodring ex. 13.

²¹ Munro ex. G.

²² Munro ex. H.

Woodring contracts. Instead, Woodring stated that Beazer assumed his prior obligations at the time of its purchase of the Ashley Manor development.²³

At the present time, Munro's property remains unconnected to the Sewer District. Although the Court heard some testimony that it is possible for Munro to obtain an exemption from Sussex County's requirement that residents living within the Sewer District connect to the sewer, neither Munro nor any of the defendants have applied for one. Woodring, however, testified that he is ready to do so now. Even so, such exemptions are discretionary with Sussex County Council and not guaranteed. Moreover, it is clear that, even with an exemption, Munro would be required by the County to purchase a sewer connection should his septic system fail in the future.

In light of the foregoing, Munro alleges that Woodring undertook a contractual obligation to connect his home to the Sewer District and failed to do so. Alternatively, Munro argues that Beazer assumed Woodring's obligation in connection with its purchase of the Ashley Manor development. Both defendants deny liability or, in the alternative, assert that the other is liable. In addition, Munro argues that, even if Beazer did not assume a contractual obligation to connect Munro to the Sewer District, it is liable for the unjust benefit it incurred through Woodring's alleged breach. Finally, Munro brought an action against Woodring for common law fraud. The Court, however, did not hear any evidence concerning this claim. Munro's fraud claim is, therefore, dismissed at this time.

ANALYSIS

Breach of Contract

The first issue is whether the two contracts, when read together or independently, impose an enforceable contractual obligation on Woodring to connect Munro to the Sewer District. The defendants argue that the first contract is not presently enforceable because, although it does impose such an obligation, that obligation was conditional on Munro's need to connect to the Sewer District in the first instance. The Court finds instead that Woodring waived the alleged condition through both his conduct and by express promise.

Delaware courts adhere to the objective theory of contracts. Unless a contract is ambiguous or there exists a suggestion of mistake, fraud, or duress, our courts give effect to the contract as it is written and understood by a reasonable third-party.²⁴ In doing so

²³ Munro ex. l.

²⁴ *Osborn ex rel. v. Kemp*, 991 A.2d 1154, 1159 (Del. 2010).

here, the Court looks only to the plain meaning of the terms found within the four corners of the agreement.²⁵

In the first contract, Woodring expressly assumed liability "for any monetary impact" the sewer expansion had on Munro's property, including "connection fees and costs of sewer service ... for 10 years from date of sewer service availability."²⁶ The Court finds that it was reasonable for Munro to expect, based on this language, that Woodring assumed a contractual obligation to connect Munro's property to the sewer. The additional term "if required," however, raises a supplemental issue as to whether the parties intended to make this obligation conditional.

Express language in a contract that qualifies a promise to perform upon the happening of a stated event creates what is known as a condition precedent.²⁷ A condition precedent is an event that, although not certain to occur, must occur before performance under a contract becomes due.²⁸ Courts interpret language such as "if," "as soon as," or "provided that" as the express creation of a condition. Even if such language is used and a condition precedent is created, it may be waived when a party conducts itself in such a way that evidences such an intention.²⁹ Consideration is not necessary to support a waiver if the condition precedent is inserted into the contract for the waiving party's benefit.³⁰

The Court finds that the parties' inclusion of the phrase "if required" is sufficient for the creation of a condition precedent. Further, a reasonable interpretation of the condition is that Woodring's performance obligation arises *only if* Sussex County deems Munro's sewer connection necessary. This interpretation of the condition is supported by the language of the contract itself: "Sussex County allows for exemptions for sewer connections under certain circumstances. Kenwood Development Co. [*i.e.*, Woodring's sole proprietorship] accepts the responsibility for filing any documents if an exemption is required."³¹

Woodring argues, however, that the condition precedent has not been satisfied because Sussex County has yet to require Munro to connect to the sewer. Notwithstanding this contention, the Court finds that Woodring waived the condition precedent in two ways:

²⁵ *Id.*

²⁶ Munro ex. C.

²⁷ 17A Am. Jur. 2d Contracts § 455.

²⁸ Restatement (Second) of Contracts § 224 (1981).

²⁹ *Pouls v. Windmill Estates, LLC*, 2010 WL 2348648 (Del. Super. June 10, 2010).

³⁰ *Id.* at n. 9; *see also*, 17A Am. Jur. 2d Contracts § 637.

³¹ Munro ex. C.

First, Woodring's conduct following execution of the contract evidences his intent to waive the condition. Woodring "accept[ed] the responsibility for filing any documents if an exemption is required."³² Woodring and his architects learned that an exemption was required only a few months after the execution of the contract upon receipt of a letter from the Sussex County Engineering Department which stated precisely that.³³ Despite this understanding, Woodring testified that he did not bother to file the necessary exemption application with Sussex County until faced with the present litigation. If Woodring intended to secure the benefit of the condition precedent, he would have followed through with the exemption application process and made certain that a sewer connection was unnecessary.

Second, Woodring expressly waived the condition precedent through the language of the second agreement. That agreement provides that "[a]t such time that the Ashley Manor residential planned community is constructed, and that the gravity sewer piping is installed along Route 20 to serve Ashley Manor, a small diameter force main *will be* installed from the Route 20 gravity sewer to your residence."³⁴ The language "[a]t such time" and "will be" effectively eliminate the function of the condition.

Beazer contends that the second agreement should be disregarded because it is a modification of the initial contract and lacks valid consideration. Specifically, Beazer posits that the purported consideration for the modification was Munro's promise to withhold his objection to the Sewer District expansion. Beazer argues that Munro had a preexisting duty that arose from the first contract to withhold his objection and such past consideration cannot supply new consideration for a subsequent modification.

While it is true that the modification is unenforceable because it is supported only by past consideration, lack of consideration does not bar enforcement of a waiver. Woodring inserted the condition into the initial contract for his benefit— it served as a means by which Woodring could avoid performance. His unconditional promise to undertake the sewer connection, regardless of whether or not a sewer connection was required, effectuates an express waiver of this benefit.

Accordingly, the Court finds that Woodring owed Munro an enforceable obligation to connect Munro's home to the sewer.

Cross-Claim

Woodring contends that Beazer assumed responsibility for honoring the Munro-Woodring contracts and, therefore, is the true party liable for breach. Specifically,

³² Munro ex. C.

³³ Woodring ex. 5.

³⁴ Munro ex. F (emphasis added).

Woodring submits that a buyer operating under a due diligence clause has an affirmative duty to discover the unperformed prior obligations of the seller and that the buyer assumes any liability after the due diligence period expires, regardless of whether such prior obligations were discovered. In support of this contention, Woodring cites *Homan v. Turoczy*.³⁵

In *Homan*, the Chancery Court dismissed the plaintiffs' claim of equitable fraud because the plaintiffs failed to satisfy the reasonable reliance element of the claim. The plaintiffs alleged that the defendant omitted material information in connection with the sale of his business. The court reasoned that the information sought by plaintiffs would have been disclosed had they engaged in serious due diligence investigation. The court concluded that the plaintiffs' purchase of the defendant's business without conducting such an investigation was commercially unreasonable.

Woodring asserts that the *Homan* opinion stands for the principle that due diligence investigations must be done in a commercially reasonable manner and that the buyer under these circumstances is responsible for any liability after purchase that arises as a consequence of not doing so. The Court does not agree.

The *Homan* court's analysis of commercial reasonableness in connection with due diligence investigations is limited to whether a buyer who brings an equitable fraud claim reasonably relied on the seller's representations. *Homan* does not impose an affirmative duty to uncover the outstanding obligations of the seller to which the buyer is not in privity of contract.

Thus, the real inquiry here is whether Beazer's conduct placed it in privity with Munro. There are several means by which a third-party, such as Beazer in this case, can establish privity with the contracting parties: assignment and delegation, a third-party beneficiary relationship, or agency. Of these means of privity, Woodring seriously asserts only that he assigned the Munro-Woodring contracts to Beazer.

Woodring submits as evidence of assignment a document entitled "Assignment as to Plans and Development Data" ("Assignment"). In that document, Woodring purportedly assigned to Ashley Manor, LLC "all ... rights, title, and interest in all Plans and other Development Data prepared by and/or acquired by and utilized by Seller's engineer ... to secure the approval of the Preliminary Site Plan ..." Even assuming that this assignment to Ashley Manor, LLC is enforceable against Beazer as well, the Court does not find that this assignment contemplates the Munro-Woodring contracts.

³⁵ 2005 WL 2000756 (Del. Ch. Aug. 12, 2005).

An assignment is the transfer of rights or property.³⁶ Thus, one can assign only rights through an assignment—not a duty to perform a personal obligation.³⁷ A delegation, conversely, is "a transaction by which a party to a contract arranges to have a third party perform the party's contractual duties."³⁸

The above quoted language does not suggest that the parties intended to *delegate* to Beazer an obligation to perform the Munro-Woodring contracts. It appears to the Court only that Woodring intended to assign Ashley Manor, LLC certain proprietary information— nothing more. Moreover, the Court cannot reasonably interpret "Plans and other Development Data prepared by and/or acquired by and utilized by Seller's engineer ... to secure the approval of the Preliminary Site Plan ..." to include copies of the Munro-Woodring contracts. While the contracts may have been integral to the approval of the "Preliminary Site Plan," the Court finds that, had Woodring intended to delegate a personal service contract, it would have done so expressly.

In addition, an assignee of rights is not bound to perform the assignor's duties and obligations associated with those rights unless the assignee expressly agrees to do so.³⁹ There is no language in the Assignment or the Agreement of Sale that convinces the Court that Beazer expressly assumed any obligation to connect Munro to the Sewer District.

Accordingly, the Court does not find that an effective delegation of the Munro-Woodring contracts occurred.

Quantum Meruit

Finally, Munro asserts a claim of *quantum meruit* against Beazer. *Quantum meruit* is "a quasi-contract claim that allows a party to recover the reasonable value of his or her services if: (i) the party performed the services with the expectation that the recipient would pay for them; and (ii) the recipient should have known that the party expected to be paid."⁴⁰

The Court finds that Munro's *quantum meruit* claim lacks merit because Munro could not have reasonably expected that Beazer, an entity whose future participation in the Ashley Manor development project was unknown to Munro at the time of his performance, would ultimately pay him for his act of removing his opposition to the

³⁶ Black's Law Dictionary 128 (8th ed. 2004).

³⁷ *Reserves Dev. LLC v. Crystal Properties, LLC*, 986 A.2d 362, 370 (Del. 2009), reargument denied (Jan. 6, 2010).

³⁸ Black's Law Dictionary 459 (8th ed. 2004).

³⁹ *Chrysler v. Airtemp Corp.*, 426 A.2d 845, 852 (Del. Super. 1980).

⁴⁰ *Petrosky v. Peterson*, 859 A.2d 77, 79 (Del. 2004).

Sewer District. Moreover, even had Beazer known of the Munro-Woodring contracts, it would have no reason to know that Munro expected Beazer to pay him for his performance. After extensive review of the trial testimony and exhibits submitted by the parties, the Court finds nothing that would serve to put Beazer on notice that Woodring failed to perform his part of the Munro-Woodring contracts and that Munro expected Beazer to pay for his service of removing his objection.

Accordingly, the Court finds that Munro failed to meet his burden for *quantum merit*.

Damages

As discussed above, Woodring owed Munro an obligation to connect Munro's property to the sewer. Woodring breached this obligation by repudiating the contract.⁴¹ Accordingly, Woodring must pay Munro damages.

The standard measure for damages recoverable for breach of contract is the expectation interest of the non-breaching party.⁴² To be entitled to expectation damages, the plaintiff "must show that the injuries suffered are not speculative or uncertain, and that the Court may make a reasonable estimate as to an amount of damages."⁴³ This requires proof of damages to a reasonable certainty.⁴⁴

Delaware recognizes the affirmative defense of failure to mitigate damages. "As an affirmative defense, it is necessary for the defendant to specially plead plaintiff's failure to mitigate damages."⁴⁵ Failure to timely raise an affirmative defense constitutes a waiver of the right to do so.⁴⁶

Based on the first contract, which the Court found to be enforceable, Munro reasonably expected Woodring to pay for any economic impact the expansion of the Sewer District had on his property. The parties stipulate that this includes System Connection Charges, Permit Fees, Service Charges, and Sewer Assessment Charges. These charges and fees amount to \$7,413.

⁴¹ Restatement (Second) of Contracts §§ 251 and 253 (1981).

⁴² *E.I. DuPont de Nemours and Co. v. Pressman*, 679 A.2d 436, 445 (Del. 1996).

⁴³ *LaPoint v. AmerisourceBergen Corp.*, 2007 WL 2565709, at *9 (Del. Ch. Sept. 4, 2007) *aff'd sub nom. AmerisourceBergen Corp. v. LaPoint*, 956 A.2d 652 (Del. 2008).

⁴⁴ *Id.*

⁴⁵ *Tanner v. Exxon Corp.*, 1981 WL 191389 (Del. Super. Ct. July 23, 1981).

⁴⁶ *Fletcher v. Ratcliff*, 1996 WL 527207 (Del Super. Aug. 6, 1996) *aff'd*, 690 A.2d 466 (Del. 1996).

In addition, the Court finds that the first contract also contemplates the actual construction of the sewer connection. At trial, Munro's expert plumber testified that such a connection will cost Munro \$14,300.⁴⁷

In defense of these damages, the defendants allege that Munro could have mitigated damages by applying to Sussex County Council for an exemption from its requirement that residents within the Sewer District must connect to the sewer. However, the defendants failed to raise the affirmative defense of failure to mitigate damages during the pleading stages of this litigation. Because affirmative defenses must be specially pleaded or else waived, the Court must treat the defendants' failure to plead the defense as a waiver.

The Court is convinced after hearing the evidence and submissions of the parties, that Munro has proven his reasonable damages in the amount of \$21,713.00.

CONCLUSION

For the foregoing reasons, the Court finds that Plaintiff has proven its claim of breach of contract against Defendant Woodring by a preponderance of the evidence. Therefore, judgment is entered against Woodring in the amount of \$21,713.00, together with pre-and post-judgment interest at the legal rate of 5.75 percent plus costs. The Court finds in favor of Defendants Kenwood Development Co. and Beazer Homes Corporation on this claim.

The Court finds that Plaintiff has failed to prove its remaining claims by a preponderance of the evidence. Accordingly, judgment is entered in favor of Defendant Woodring on Plaintiff's claim for fraud. Additionally, on Plaintiff's claim for *quantum meruit*, judgment is entered in favor of Defendant Beazer Homes Corporation.

Finally, the Court finds that Defendant Woodring failed to prove its cross-claim against Defendant Beazer Homes Corporation. Therefore, judgment is entered in favor of Defendant Beazer Homes Corporation on that claim.

IT IS SO ORDERED, this ____ day of June, 2011

Rosemary Betts Beauregard. JUDGE

⁴⁷ Woodring disputes Munro's expert's belief that two-inch diameter sewer discharge lines are necessary to complete the connection. Instead, Woodring suggests that one-inch lines are adequate. Because Woodring did not submit any expert testimony in rebuttal of Munro's expert plumber, the Court must again find in favor of Munro on this issue.